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No. 80-241

In the Supreme Court of the United States

OCTOBER TERM, 1979

KABLE PRINTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

LOCAL 91-P, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably determined that petitioner's striking employees were entitled to vote in a Board-conducted representation election and that petitioner's refusal to bargain with the union that won the election was, therefore, an unfair labor practice.

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OPINIONS BELOW

The order of the court of appeals enforcing the Board's order (Pet. App. A1-A4) is unreported. The decision and order of the National Labor Relations Board (Pet. App. A7–A19) are reported at 243 N.L.R.B. No. 167. The decision and direction of election of the National Labor Relations Board in the underlying representation proceeding (Pet. App. A20–A40) are reported at 238 N.L.R.B. No. 156.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1980; an amended judgment was entered on August 27, 1980 (App., *infra*). A petition for rehearing was denied on July 25, 1980 (Pet. App. A5–A6). The petition for a writ of certiorari was filed on August 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. A41–A42. Also relevant are Section 8(a)(1) and (5) and portions of Section 9(b) and 9(c)(1) of the Act, 29 U.S.C. 158(a)(1) and (5) and 29 U.S.C. 159(b) and (c)(1):

> Section 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 9. (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

1. This case grows out of a protracted labor dispute between petitioner and the respondent Union.[1] The

[1] Local 91-P, Graphic Arts International Union, AFL-CIO. The Union was the charging party before the Board and an intervenor in the court below.

last of a series of collective bargaining agreements between petitioner and the Union expired on March 31, 1974 (Pet. 2-3; Pet. App. A23). Negotiations for a new agreement were unsuccessful and the Union struck on May 10, 1974 (Pet. 3; Pet. App. A23). All 113 of petitioner's rotogravure employees joined the strike (Pet. 3; Pet. App. A32).

One aspect of the labor dispute between the parties concerned the Union's effort to protect employee jobs through manning requirements and petitioner's view that these requirements interfered with the introduction of new, more technically advanced equipment. Petitioner's parent company, Western Publishing Corporation, stated in its third-quarter report for 1974 that it "desired to expand [petitioner's] facility, to install new equipment and to move into new fields of activity but these could not be accomplished without a major revision of the existing labor contracts" (Pet. App. A25 n.4).

In July 1974, petitioner warned the Union that, if the strike were not called off, it might permanently shut down a portion of the business—the rotogravure preparatory operations performed by the strikers. When this warning produced no progress in negotiations, petitioner announced the termination of that portion of the business on July 22, 1974 (Pet. 3; Pet. App. A24). Petitioner thereafter began to contract out this work to other employers (Pet. App. A25).[2] Al-

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[2]The Union and its affiliates brought economic pressure to bear on those employers to dissuade them from performing the struck work. Petitioner contended that this pressure constituted unlawful secondary activity because petitioner had ceased

though petitioner initially experienced some difficulty in contracting out the work because of the effectiveness of the Union's countermeasures, it ultimately entered into long-term contracts to have other employers supply the press-ready rotogravure cylinders needed by petitioner for production on its presses to meet its customers' printing orders (*id.* at A25–A28). In addition, petitioner disposed of most of its rotogravure processing equipment, thereby eliminating its capacity to produce press-ready rotogravure cylinders in its own plant (*id.* at A27). However, petitioner continued to employ some individuals to perform work previously done by the strikers relating to inspection and maintenance of rotogravure cylinders. Petitioner also continued to enter into contracts with its customers for the performance of services encompassing the entire rotogravure process, including cylinder engraving. (*Id.* at A28.)

In the meantime, the Union requested a resumption of bargaining with petitioner in September 1975. Petitioner refused and filed a representation petition with the Board seeking an election to determine if the employees still wanted the Union to represent them.

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performing the strikers' work by permanently subcontracting it to allegedly neutral employers. The Board rejected this contention and held, with the subsequent approval of the Seventh Circuit, that the employers to whom petitioner had subcontracted the work were allies in petitioner's dispute with the Union and not neutral employers under the Act. (Pet. 4; Pet. App. A25–A27.) See *Kable Printing Co.* v. *NLRB*, 545 F.2d 1079 (1976), aff'g 225 N.L.R.B. 1253 (1976). See also *Blackhawk Engraving Co.* v. *NLRB*, 540 F.2d 1296 (1976), aff'g 219 N.L.R.B. 1030 (1975); *Kable Printing Co.* v. *NLRB*, 540 F.2d 1304 (1976), aff'g 219 N.L.R.B. 1053 (1975) and 220 N.L.R.B. 407 (1975).

(Pet. 4.) At the representation hearing and in its post-hearing brief to the Board in January 1977, petitioner took the position that the jobs of most of the 113 strikers had been "permanently abolished" through subcontracting of their work and that only seven current employees, performing residual unit work, were eligible to vote in the election (Pet. 3-4; Pet. App. A21; A.125-126, 141).[3] Petitioner's brief to the Board further asserted that petitioner had sold the equipment necessary to do any rotogravure processing work in the plant, that it would have to incur enormous expense to revert to its former method of operating, and that there was "absolutely no basis in this record to conclude that it would be economically advantageous, or even economically feasible," for petitioner to reverse its decision to subcontract the strikers' work "now or in the future" (A. 132-133; see also Pet. App. A28).

The Union, in its initial brief to the Board, contended that petitioner's announced decision permanently to discontinue the production of rotogravure cylinders was a bargaining stratagem designed to force capitulation by the Union during the strike. Consequently, the Union argued that the unreplaced strikers should be permitted to vote in any representation election directed by the Board because they had a reasonable expectation of reinstatement after the strike, when petitioner could be expected to resume production of rotogravure cylinders in its plant. According to the Union, petitioner's subcontracting of this work had resulted in substantial inefficiencies,

[3] "A." refers to the appendix in the court of appeals.

given the size and weight of the cylinders (about 2,000 pounds each) and the fact that during the correction process the cylinders must be moved many times over great distances between petitioner's pressroom and the subcontractors' rotogravure preparatory areas. These inefficiencies could be removed, the Union argued, only by petitioner's resuming performance itself of the rotogravure preparatory work currently in the hands of the subcontractors. (Pet. App. A22, A29 n.8.)

In October 1977, while the issue of the strikers' voting eligibility was still pending before the Board, the Union proffered evidence that petitioner was resuming rotogravure preparatory operations in its plant with new, more sophisticated equipment—a Helio-Klischograph cylinder-making system (Pet. App. A22). The Board granted the Union's motion for special permission to introduce this new evidence (*id.* at A22 n.2), which showed that at least six months earlier petitioner's parent company, Western Publishing Corporation, had arranged to purchase a Helio-Klischograph system to produce rotogravure cylinders for use on petitioner's presses and that installation of the new equipment at petitioner's plant and petitioner's planned resumption of the production of rotogravure cylinders had finally been announced in September 1977 (Pet. App. A28–A30; A. 143–169).

In its response to the Union's motion, petitioner did not dispute this evidence but instead asserted that it had changed its mind about permanently subcontracting the rotogravure preparatory work (A. 174–175) and that, as a result of the acquisition of the new

equipment to do the work, the strikers' jobs had been abolished through automation (A. 175–178).[4] The Union, on the other hand, reiterated its contention that petitioner had never intended permanently to subcontract the strikers' work and that it had announced the decision to do so purely as a strike or bargaining stratagem. According to the Union, the newly discovered evidence proffered with its motion showed that, while petitioner was claiming to have permanently ceased rotogravure preparatory operations, it had surreptitiously arranged to automate this work, as it had always intended to do, without bargaining with the Union. The Union further argued that, contrary to petitioner's contention, the new automated equipment had not eliminated the strikers' reasonable expectations of reemployment and that there would be work for a significant number of strikers when petitioner resumed full production of cylinders within the plant. (Pet. App. A22; Union's Motion to Adduce Additional Evidence, at 8, 17–25.)

2. In September 1978, the Board (Member Murphy dissenting) issued a decision and direction of election (Pet. App. A20–A40), finding the strikers eligible to vote in the representation election. The Board determined that "at no time relevant herein did [petitioner] intend to abandon permanently its rotogravure preparatory operations" and that petitioner "intended at

[4] Petitioner offered no new evidence to support this contention and relied solely on statements of management, quoted in the documents attached to the Union's motion, to the effect that petitioner intended to operate the new automated equipment with existing employees and that no additional employees would be required (A. 173, 175, 177, 164–168).

all times herein relevant to continue performing rotogravure preparatory work as the only means by which to achieve those business objectives to which it was unalterably bound" (*id.* at A30). The Board also concluded that petitioner had displayed a "substantial lack of candor" in this regard, as evidenced by its failure to reveal to the Board the facts concerning the acquisition and location of the Helio-Klischograph system at its plant and the planned resumption of rotogravure preparatory operations with the new equipment (*ibid.*). "In these circumstances and at this stage of the instant proceeding," the Board stated, "we deem it inequitable and unjust to permit [petitioner] to use the very evidence it withheld for so long to disenfranchise the striking employees, by asserting that its new cylinder-engraving system extinguishes any reasonable expectancy of future employment on the part of those employees" (*id.* at A31).

Moreover, the Board explained that the strikers would be eligible to vote at the representation election even if petitioner had permanently discontinued the production of rotogravure cylinders, as it had announced, because that announcement was "predicated wholly on considerations flowing from the strike itself" (Pet. App. A31). Thus, the Board found that petitioner "evidenced no intention to abolish its rotogravure preparatory operations prior to the onset of the strike" and that, only after the strike proved effective, did it subcontract the strikers' work in order to protect its contracts with customers and avoid the economic impact of the strike (*id.* at A31–A32). On this basis, the Board concluded that "[s]uch economic considerations,

which were generated by the effectiveness of the strike itself, are insufficient, in our view, to justify disenfranchising strikers who are otherwise eligible to vote in a unit which continues to perform much of the work manifestly within its jurisdiction" (*id.* at A32).

Accordingly, the Board directed that an election be conducted in which the strikers would be permitted to vote (Pet. App. A35–A36). Pursuant to this directive, the votes of 45 strikers were counted, over petitioner's objection; the Union won the election by a vote of 46 to five, and was certified on March 14, 1979 (*id.* at A10–A11; A. 227). Thereafter, petitioner refused to bargain in order to test the validity of the Union's certification (Pet. 7). An unfair labor practice proceeding was commenced before the Board, which found (Member Murphy dissenting) that petitioner's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. A13, A15). Accordingly, the Board ordered petitioner to bargain with the Union on request (*id.* at A13–A14, A16).

3. The court of appeals denied petitioner's request for review and enforced the Board's order (Pet. App. A1–A4). Noting that strikers retain their eligibility to vote unless there is a clear showing that their tie to the employee unit has been cut (*id.* at A3), the court held that "the Board had ample evidence before it to allow for the conclusion that the ties of the Kable strikers to the petitioner's working employees remained significant at the time of the election in question" (*id.* at A4). The court also rejected petitioner's contention that the Board had committed reversible

error by refusing on equitable grounds to accord weight to the statements of management that the strikers' jobs had been eliminated through automation. In the court's view, "the evidentiary ruling complained of was not so improper as to constitute an abuse of discretion which would warrant overturning the Board's findings * * *" (*id.* at A3). To the contrary, the court concluded "that the evidence in question was not, when viewed in conjunction with the other evidence presented, of such significance as to reasonably increase the likelihood that a different result would have been reached" (*ibid.*).

ARGUMENT

Under Section 2(3) of the Act, 29 U.S.C. 152(3), strikers retain their status as employees until they secure regular and substantially equivalent employment elsewhere. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 104 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). Although elimination of strikers' jobs may defeat their reinstatement, and accordingly their voting rights, the burden is on the party challenging those rights to establish that the strikers' jobs have been eliminated "for substantial and bona fide reasons other than considerations relating to labor relations." *NLRB* v. *Fleetwood Trailer Co.*, *supra*, 389 U.S. at 379. The lower court's affirmance of the Board's finding that petitioner failed to meet that burden here involves only the application of this rule to the particular facts of this case and presents no issue warranting further review.

In any event, the court of appeals' decision was correct. In an effort to show that the strikers' tie to the employee unit had been cut, petitioner initially contended that the strikers' work had been permanently subcontracted and would never again be resumed by petitioner—a position it maintained throughout the representation hearing and in its post-hearing brief to the Board (see page 5, *supra*). After carefully considering the record in this and related proceedings (Pet. App. A26–A30), the Board expressly concluded "that at no time relevant herein did [petitioner] intend to abandon permanently its rotogravure preparatory operations" and "that [petitioner] intended at all times herein relevant to continue performing rotogravure preparatory work as the only means by which to achieve those business objectives to which it was unalterably bound" (*id.* at A30). The court of appeals properly sustained this determination, finding "that the Board had ample evidence before it to allow for the conclusion that the ties of the Kable strikers to the petitioner's working employees remained significant at the time of the election in question" (*id.* at A4).[5]

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[5]The Board also concluded (Pet. App. A31) that it would have reached the same result even if it had found that petitioner permanently discontinued the production of rotogravure cylinders. The Board determined that the discontinuation asserted by petitioner was predicated "on considerations flowing from the strike itself" (*ibid.*) and that "[s]uch economic considerations, which were generated by the effectiveness of the strike itself, are insufficient, in our view, to justify disenfranchising strikers who are otherwise eligible to vote in a unit which continues to perform much of the work manifestly within its jurisdiction" (*id.* at A32). Petitioner has not challenged this alternative holding of the Board.

After the Union had proffered evidence to the Board that petitioner was resuming the subcontracted rotogravure work using new equipment, petitioner shifted its ground to contend that the strikers' jobs had been automated and that, even when full operation was resumed, there would be no jobs available for the strikers. Petitioner advanced no new evidence to support its contention, relying instead on the self-serving and conclusory statements contained in its documents that were offered by the Union. Because these statements were inconsistent with petitioner's earlier position, were contained in evidence that petitioner had long failed to disclose, and were presented only when petitioner's previous position in the proceeding was revealed to be false (Pet. App. A28-A30), the Board concluded that it would be "inequitable and unjust to permit [petitioner] to use the very evidence it withheld for so long to disenfranchise the striking employees * * *" (*id.* at A31). Accordingly, the Board declined to allow petitioner to rely on the assertion that, through automation, "its new cylinder-engraving system extinguishes any reasonable expectancy of future employment on the part of those employees" (*ibid.*). In these circumstances, the court of appeals properly affirmed the Board's order, holding that "the evidentiary ruling complained of was not so improper as to constitute an abuse of discretion which would warrant overturning the Board's findings in this matter" and that, in any event, "the evidence in question was not, when viewed in conjunction with the other evidence presented, of such significance as to reasonably increase the likelihood that a different result would have been reached" (*id.* at A3).

Notwithstanding petitioner's contention (Pet. 9–10, 12–13), the court of appeals' decision does not conflict with the substantial-evidence standard of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). The requirement that "the whole record" be considered (*id.* at 488) does not obligate the Board to permit petitioner to present at the eleventh hour a theory of the case that was inconsistent with its prior position and was based on "the very evidence [petitioner] withheld for so long * * *" (Pet. App. A31). But at all events, the court of appeals correctly concluded "that the evidence in question * * *, when viewed in conjunction with the other evidence presented, [was not] of such significance as to reasonably increase the likelihood that a different result would have been reached" (*id.* at A3).

Nor, contrary to petitioner's assertion (Pet. 11–12), does the decision below conflict with *Allied Chemical and Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). There, the Court held that the employer had no statutory duty to bargain about the benefits of already retired employees, whose final cessation of employment was not in dispute. Here, on the other hand, the issue is the voting eligibility of strikers whose tie to the active employee unit has not been shown to have been severed. Similarly distinguishable are the cases cited by petitioner (Pet. 14–18) holding that employees discharged for cause, or strikers with no reasonable expectation of recall, are ineligible to vote in representation elections. In the instant case, by contrast, the Board found that the strikers did have a reasonable expectation of future employment with petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

No. 79-1891

KABLE PRINTING COMPANY, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

LOCAL 91-P, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, INTERVENOR.

AMENDED JUDGMENT

Before: ROBERT A. SPRECHER AND HARLINGTON WOOD JR., *Circuit Judges* and NICHOLAS J. BUA, *District Judge**

THIS CAUSE came on to be heard upon a petition filed by Kable Printing Company, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on August 3, 1979, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on Feburary 25, 1980, and has considered the briefs and transcript of record filed in this cause. On April 24, 1980, the Court, being fully advised in the

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*District Judge Nicholas J. Bua of the Northern District of Illinois is sitting by designation.

premises, issued its order denying the petition for review and granting enforcement of the Board's said order. In conformity herewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Petitioner, Kable Printing Company, Mount Morris, Illinois, its officers, agents, successors, and assigns, abide by and perform the directions of the Board contained in said order.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioner.

/s/NICHOLAS BUA
District Judge, United States
District Court for the
Northern District of Illinois

A True Copy:
Teste:

/s/KRYSTINE F. JULIUN, Deputy
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

U.S.C.A.—7th Circuit
FILED: August 27, 1980

THOMAS F. STRUBBE
Clerk

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